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No. 435

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1956

JOHN F. MULCAHEY, DISTRICT DIRECTOR OF IMMIGRATION AND NATURALIZATION SERVICE, DETROIT, MICHIGAN,
Petitioner,

v.

GUISEPPE CATALANOTTE

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

PETITION FOR REHEARING

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GUISEPPE CATALANOTTE

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PETITION FOR REHEARING

Guiseppe Catalanotte, respondent herein respectfully petitions for a rehearing of the opinion and judgment of this court rendered June 3, 1957.

This court on June 3, 1957, reversed judgments of the Court of Appeals for the Sixth Circuit in this case and a companion case, *Lehmann* v. *United States ex rel. Carson.* The respondent filed his brief on the merits of the case wherein he referred to the two main points raised by the government. Under the first point he relied upon the applicability of the savings clause to the respondent's situation and cited two decisions of this court *U. S.* v. *Menasche*, 348

U. S. 528 and *Shomberg* v. *U. S.* 348 U. S. 540. The opinion of the court in the instant case takes those two prior decisions out of consideration upon the issue here.

Under point two the respondent stated, "If the respondent is protected by the savings clause against retroactive deportation, there is no occasion for the due process of law argument. But, if he is not so protected by the statute he says the due process clause protects him. The Board of Immigration Appeals on the other hand chose to cite ex post facto and claimed clearance for its action."

The court having found that the savings clause affords the respondent no protection, respondent respectfully urges upon the court further consideration of the constitutionality of Section 241 (a)(11) and (d) of the Immigration and Nationality Act of 1952.

It is noted that the court in its opinion states, "At that time there was no statute making that offense a ground for deportation." The statutory provision which made conviction for certain narcotic offenses a ground of deportation was enacted in 1922 and has continued in effect until the present time, with amendments. The Immigration Act of 1917 provided a defense for a person convicted on a narcotics offense if he applied to the sentencing judge within 30 days. If Catalanotte had been charged, as he might have been, under Section C of the amended narcotics statute to which the deportation was specifically attached, he would have had the opportunity to avail himself of the provision for applying to the sentencing court for a recommendation against deportation which, if granted, would have thereafter made him immune to deportation on that charge.

Catalanotte is ordered deported *solely* because of a conviction of a narcotic offense for which he was sentenced in 1925.

The constitutional question, here urged, was not directly presented, for the reason that the language of the savings clause, preserving a status existing on the effective date of the statute, and the judicial decisions heretofore published with reference to this statute, so limited the scope of the inquiry as not to reach the constitutional question until now. *Bugajewitz* v. *Adams supra* at page 591.

This respondent raised the question of his constitutional protection, as a possible and present alternative to protection to him by virtue of the savings clause, before the Board of Immigration Appeals, and throughout his defense. Discussion of this point was not considered within reach because recognition of an effectiveness of the statutory provision, now reversed, made the consideration of a constitutional objection unnecessary.

The constitutional provisions referred to are:

Amendment V.

"No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

Article I. Section 9.

"No Bill of Attainder or ex post facto Law shall be passed."

Catalanotte is being held at the present time to answer again for an indictable offense, without a presentment or

indictment of a Grand Jury, for an offense for which he was in 1925 indicted by a grand jury, tried and sentenced.

It is true that the immigration act does not in terms call itself an amendment to the criminal statute under which Catalanotte was indicted and sentenced, but it has that effect. In his brief before the Court of Appeals, appellant said, "This case cannot escape the character of a criminal case", if one looks at the substance instead of the form. Brief C. A. pp. 1819.

The statute under which Catalanotte was indicted and sentenced was originally enacted December 17, 1914. (38 Stat. 785). It was specifically made supplemental to two earlier statutes, the Pure Food and Drug Act of 1906, and the Narcotics Drugs Import and Export Act of 1909, approved February 9, 1909. The latter, which has generally been considered the basis of all federal regulation of narcotic drugs, was amended in 1922 (42 Stat. 596, approved May 26, 1922) to create a Federal Narcotic Control Board, to redefine "narcotic drugs" to include "cocaine" (the only drug with which Catalanotte was charged) and to redefine and punish offenses. In the penalty section of the statute as amended, three forms of punishment are provided, a fine of not more than $5,000.00, imprisonment for not more than ten years, and deportation, in accordance with the provisions of Sections 19 and 20 of the Immigration Act of February 5, 1917, if it so happened that a person convicted under section (c) of the amended act were an alien convicted after entry. But deportation was authorized only "upon the termination of the imprisonment imposed by the court". If the government did proceed to deport such alien, the existing law further gave the alien an additional defense to such deportation in that he could within 30 days of sentence ask the trial court for a recommendation against deportation, and if granted, such deportation would not be made or directed.

The statute of limitations in effect at that time provided that the government had three years from the date of the offense within which to prosecute. Suppose, for the sake of argument, that four years after the date of the offense, Congress had attempted to legislate in substantially these words, "We consider narcotic offenses to be more serious than did the Congress which sat in 1922, and therefore we enact that any person heretofore convicted of a narcotic offense shall be sentenced to an additional fine and imprisonment, and in the case of an alien so convicted, he shall be deported at any time hereafter that the government pleases and regardless of whether he was convicted under Section (c) of said act of 1922 or any other law relating to traffic in narcotic drugs."

Is there much room for doubt that such an enactment would have been stricken down as highly unfair and oppressive. It might have been considered a bill of attainder because it imposed a penalty without a judicial trial. It seems clearly to be ex post facto, because it relates an increased penalty, and a much longer statute of limitation, back to an act that was done and complete before the penalty was imposed. It would be a violation of due process of law because the persons theretofore convicted could have had no notice of a penalty which did not exist in the law at the time of conviction, and because, by the delayed imposition of the penalty by surprise, the convicted persons were deprived of any opportunity to avail themselves of defenses which were offered for a limited time.

Now, it does not seem logical that the essential character of such legislation is different from that just described, where the amending act is not four, but thirty years later, and the history of the original criminal statute is nearly forgotten and lost in antiquity. If it is objected that such is not technically an "amending act" then we should call it an enlarging act, because it has the effect of enlarging a

criminal statute, to increase the penalty, the time within which the penalty may be imposed, and the procedural advantages to the government in imposing the penalty. It diminishes or removes defenses formerly available to a defendant.

It is also noted in the opinion of the court that the court says, "It seems to us indisputable, therefore, that Congress was legislating retrospectively, as it may do, to cover offenses of the kind here involved." This clearly means that Congress may provide that convictions for past offenses may be taken into consideration by the immigration authorities in determining future deportability. That this situation raises a question of the application of the ex post facto clause is evident from the number of times that courts have been asked to pass on an ex post facto claim in deportation cases. However, it is earnestly urged upon the court that the situation presented by Catalanotte is much more definitely within the area prohibited to Congress by the Constitution of the United States than any other which has appeared in the discussions of this issue. In this case Congress has not set up any standard of future undesirability based upon any conduct subsequent to the date of the enactment of the deportation statute. It is simply a plain effort in this section of the statute to add the additional penalty of deportation based on the sole fact of the conviction of any narcotics offense at any time in the past. We believe this is forbidden by the Constitution and that acquiescence in this result would go much beyond any decision up to this time.

May we examine again decisions of this court cited in support of the proposition that Congress may legislate retrospectively. We hope to show that this proposition, on the basis of the authorities cited, has limitations far short of those inherent in the present case.

The earliest decision upon which the opinion of the court relies is *Bugajewitz* v. *Adams*, 228 U.S. 585. The petitioner herein respectfully calls attention to the fact that the situation before the court in *Bugajewitz* v. *Adams* was not one involving retroactive effect of a deportation statute. Some remarks in the course of the courts opinion pointed in this direction but a reading of the decision makes it clear that the case does not hold that Congress may pass a retroactive deportation statute nor that the executive department may enforce such a statute within their respective constitutional limitations. Bugajewitz was ordered deported for an act of prostitution. At page 590, the report includes the following statement by Mr. Assistant Attorney General Harr, "The appellant was not arrested for practicing prostitution prior to the statute, but because she was found so engaged after its enactment." This would seem to make it clear that the case of *Bugajewitz* v. *Adams* and the later cases which turned upon its authority are not precedents for upholding retrospective provisions of an immigration law.

In *Bugajewitz* v. *Adams* the court placed some weight on its prior decision of *Johannsen* v. *U. S.*, 225 U.S. 227 which likewise does not hold that Congress has constitutional power to enact a retroactive ground of deportation. The issue in the Johannsen case was whether a naturalization court had power to revoke a naturalization which has been procured by fraud. At page 242 the court says, "The act makes nothing fraudulent or unlawful that was honest and lawful when it was done. It imposes no new penalty upon the wrongdoer." It seems to be undisputed that in the present case the Immigration and Nationality Act of 1952 does impose a new penalty for an act that was performed and was complete, with punishment, many years before the effective date of the Immigration and Nationality Act. It is submitted that by a very clear inference the court in the

Johannsen opinion condemns the kind of statute which has the effect of the Immigration Statute in this case. When the Johannsen decision was considered in the Bugajewitz case, this court again condemned retrospective statutes by inference when it says with respect to Bugajewitz, "It is not necessary to construe the statute as having any retrospective effect."

In the case of *Ng Fung Ho* v. *White*, 259 U.S. 276 it does not involve the enforcement of a retroactive ground of deportation.

In *Galvan* v. *Press*, 347 U.S. 522, the court dealt with communist party membership which was made a ground of deportation against persons whose membership antedated the enactment of the act. This court, however, in dealing with the situation presented in *Harisiades* v. *Shaughnessy*, 342 U.S. 580 and *Galvan* v. *Press*, *supra*, made the point that there was more the appearance than an actuality of retroactive effect inasmuch as the deportation statute was a re-enactment of previous statutes which put the aliens on notice that the conduct for which they were being ordered deported was prohibited under law under penalty of deportation.

In the decision of *Galvan* v. *Press*, the court specifically pointed out the possible application and force of an objection to a retroactive deportation statute on the ground that it violates the due process provisions of the Federal Constitution. This reference by the court seems to be particularly significant in the case of this petitioner. The question of the denial of due process of law and the applicability of the constitutional provisions prohibiting bills of attainder and ex post facto laws were expressly mentioned by Catalanotte in his defense before the Board of Immigration Appeals and were preserved in the District Court wherein he claimed a misapplication of the law. These points were again referred to in his brief before the

Court of Appeals. So long as there was apparent authority of this court to apply the savings clause in favor of Catalanotte, his claim to constitutional protection was set aside and not considered except as an alternative which would become a necessary alternative at any time that the protection of the savings clause would be construed as being unavailable to Catalonette. The decision of the court makes the savings clause unavailable to Catalonette and, therefore, he respectfully requests this court to consider the alternative objection which he has endeavored to preserve throughout various stages of the proceedings.

The petitioner here wishes to recall to the court that at the time of the indictment and conviction of Catalanotte in 1924 and 1925 there was a provision in the penalty section of the statute prohibiting traffic in narcotics for the deportation of any alien convicted under a certain section of that statute. In other words a criminal statute provided three kinds of penalty, a fine, imprisonment, and in the case of an alien, the additional penalty of deportation. The United States Attorney had the option to proceed in such a manner as to deport Catalanotte at the termination of his imprisonment in 1925. He did not elect to do so. By way of argument it may be pointed out that the court on the recommendation of the United States Attorney might have elected to waive either the fine or the imprisonment portion of the penalty. If the government through its authorized representative had waived either the fine or the imprisonment in 1925 and thereafter in 1953 had petitioned the court to add the part of the penalty which had been duly waived in 1925, the alien so proceeded against would have been protected by the due process of law provision of the Constitution. The effort to deport Catalanotte differs from this situation in that Congress has passed a new statute to do what the government's authorized representatives could have done but did not do in 1925.

By referring only to the new statute and not to the old statute, the government seemingly avoided the appearance of adding to a criminal case the third part of the penalty statute which was available to the government in 1925.

There appears to be no difference in principal, should a greater fine or imprisonment be added, from that which exists in the case at bar wherein penalty of deportation is added to the penalties already imposed for the conviction of 1925.

Conclusion

When the savings clause of the Immigration and Nationality Act was rejected as affording no protection to the respondent, the constitutionality of Section 241 as applied to the facts in the respondent's case under Article 1, Section 9 and also amendment 5 of the United States Constitution should be decided. We respectfully urge the court to grant this petition for rehearing so that it may consider whether the application of the statute to the facts of this case are in accord with the provisions of the Constitution and the judicial precedents.

Respectfully submitted,

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Detroit 26, Michigan.

JUNE 12, 1957.

Certification

I hereby certify that the foregoing petition for rehearing is presented in good faith and not for delay.

LOUIS M. HOPPING,
Attorney for Respondent.